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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Appellant,

v.

JESUS MIGUEL MOLINA,

Defendant and Respondent.

F042167

(Super. Ct. No. 41795)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Tulare County. David L. Allen, Judge.

Phillip J. Cline, District Attorney, Don H. Gallian and Carol B. Turner, Assistant District Attorneys, and Barbara J. Greaver, Deputy District Attorney, for Plaintiff and Appellant.

Cliff Gardner, under appointment by the Court of Appeal, for Defendant and Respondent.

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This case is about the appropriate sentence to be imposed on respondent Jesus Miguel Molina, who was found by a jury to have violated the so-called one strike law

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\* Before Ardaiz, P.J., Dibiaso, J. and Harris, J.

(Pen. Code, § 667.61)<sup>1</sup>. On this appeal by the People, both appellant and respondent agree (as do we) that the sentence imposed by the trial court was incorrect. We will vacate Molina’s sentence and remand the case to the superior court for resentencing.

### FACTS

The facts pertinent to this appeal are procedural. A jury found Molina guilty of kidnapping for rape (§ 209, subd. (b), count 1); two counts of committing a lewd act by force upon a child (§ 288, subd. (b)(1), counts 2 and 4); forcible penetration with a foreign object (§ 289, subd. (a), count 3); and aggravated sexual assault of a child (§ 269, subd. (a), count 5). Allegations of circumstances bringing the count 2, 3 and 4 offenses within the scope of the one strike law were found by the jury to be true. The trial court sentenced Molina to an indeterminate life term with the possibility of parole on count 1, a consecutive indeterminate term of 25 years to life on count 2, a concurrent indeterminate term of 25 years to life on count 3, a consecutive indeterminate term of 25 years to life on count 4, and a stayed 15 years to life term on count 5.

Molina appealed. In an unpublished opinion (*People v. Molina* (Apr. 1, 2002, F035714) [nonpub. opn.]), we agreed with Molina’s contention that under section 667.61, subdivision (g) he could not properly be sentenced to three, 25 years to life terms on counts 2, 3 and 4. Subdivision (g) of the one strike law provides that a one strike sentence of 25 years to life (see § 667.61, subdivision (a)) “shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion.” (§ 667.61, subd. (g); see also *People v. Jones* (2001) 25 Cal.4th 98, at pp. 103-107.) We stated “appellant should have received one indeterminate term of 25 years to life for one of the multiple sexual offenses under section 667.61, subdivision (g)

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise indicated.

of the one strike law.” (*Peo. v. Molina, supra*, F035714, p. 20.) In our disposition of appellant’s appeal, we stated:

“The sentences imposed in counts 2, 3, and 4 are each reversed, and the matter is remanded for resentencing as provided in this opinion. Appellant may be sentenced to a single indeterminate term of 25 years to life under section 667.61, subdivision (g) because the sexual offenses in counts 2, 3, and 4 were committed against the victim during a single occasion. However, the trial court may impose the appropriate determinate sentence for the remaining one-strike convictions, as provided by subdivision (g).

“In all other respects, the judgment is affirmed.” (*Id.* at pp. 20-21.)

On remand, the trial court did not impose a section 667.61 one-strike sentence on any of the counts. The court expressly stated that in its view this court had remanded only “to re-sentence the defendant on Counts 2, 3, and 4.” It therefore did not change the sentences imposed on counts 1 and 5. It sentenced Molina to an 8-year consecutive term on count 2, an 8-year consecutive term on count 3, and an 8-year concurrent term on count 4. The trial court appears to have viewed our opinion as having prohibited the trial court from imposing a 25-years-to-life sentence on count 2, 3 or 4 given that a life term had been imposed on count 1.

The People then filed this appeal. The People contend, and respondent agrees, that subdivision (f) of section 667.61 requires the trial court to impose a one-strike sentence of 25 years to life on count 2, 3 or 4.

### **DISCUSSION**

We agree with appellant and respondent that subdivision (f) of section 667.61 requires the trial court to impose a one-strike law sentence of 25 years to life on count 2, 3 or 4. Subdivision (f) states:

“If only the minimum number of circumstances specified in subdivision (d) or (e) which are required for the punishment provided in subdivision (a) or (b) to apply have been pled and proved, that circumstance or those circumstances shall be used as the basis for imposing

the term provided in subdivision (a) or (b) rather than being used to impose the punishment authorized under any other law, unless another law provides for a greater penalty. However, if any additional circumstance or circumstances specified in subdivision (d) or (e) have been pled and proved, the minimum number of circumstances shall be used as the basis for imposing the term provided in subdivision (a), and any other additional circumstance or circumstances shall be used to impose any punishment or enhancement authorized under any other law. Notwithstanding any other law, the court shall not strike any of the circumstances specified in subdivision (d) or (e).

We applaud the trial court for its adherence to the law of the case doctrine and for attempting to impose an appropriate sentence under the circumstances we presented to it with our disposition of the F035714 appeal. Frankly, it appears to us that the trial court was wiser with appellant's second sentencing than we were in our wording of the disposition of appellant's F035714 appeal. In essence it appears to us that we stated, or at least implied, that the trial court should impose a sentence which, when imposed, would not comply with the one strike law. This is because the section 667.61, subdivision (e)(1) special circumstance of kidnapping could not be used to punish appellant with a life sentence on count 1 (kidnapping for rape), as well as with a one strike law sentence of 25-years-to-life on count 2, 3 or 4. (See § 667.61, subd. (f), *supra*.) Furthermore, subdivision (f) requires that a one-strike law sentence of 25 years to life be imposed "unless another law provides for a greater penalty." (§ 667.61, subd. (f).) Because, as both sides agree, a sentence of life with the possibility of parole (imposed on count 1) is not a "greater penalty" than a sentence of 25 years to life, the one strike law requires the imposition of a 25-years-to-life sentence on count 2, 3 or 4. Under these circumstances, the appropriate course of action appears to be to remand the case for resentencing on all counts, with directions to impose a one-strike law sentence of 25 years to life on one of counts 2, 3 or 4, and to sentence appropriately and in accordance with law on all other counts. "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." (*Wolf v. Colorado* (1949) 338 U.S. 25, 47 (Rutledge, J.,

dissenting); see also *People v. Superior Court (Caswell)* (1988) 46 Cal.3d 381, 394, fn. 4.)

### **DISPOSITION**

The matter is remanded to the trial court for resentencing in accordance with the views expressed in this opinion. The trial court shall impose a one-strike law sentence of 25 years to life on count 2, 3 or 4, and shall sentence respondent Molina appropriately and in accordance with law on all other counts.